

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

V.

JENNIFER A. GOSAR, HOWARD GALE,
ELIZABETH MUELLER GRAHAM,
NICHOLAS PEDA, NIKITA MINKIN,
JESSIE YADLOWSKY

Defendants.

CASE NOS. 19-306; 19-307; 19-308;
19-313; 19-315; 19-320

**ORDER GRANTING
GOVERNMENT'S MOTION IN
LIMINE TO EXCLUDE DEFENSES**

The United States of America (government) moves *in limine* to exclude “all evidence, comment, and argument” regarding defenses based upon necessity, international law or its principles, the First Amendment right to assemble and petition, or the Religious Freedom and Restoration Act (RFRA). Dkt. 31. Defendants oppose the motion and contend the Court should deny the government’s motion and permit them to raise defenses on necessity and RFRA. Dkt. 44.

The Court may determine the admissibility of defenses by motions *in limine*. See *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985). The sole question the Court must address is whether Defendants' offer of proof is insufficient as a matter of law. *Id.* "If it is, then the trial

1 court should exclude the defense and the evidence offered in support.” *Id.*

2 **A. Necessity Defense**

3 “To invoke the necessity defense, Defendants must show (1) they were faced with a
4 choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they
5 reasonably anticipated a direct causal relationship between their conduct and the harm to be
6 averted; and (4) they had no legal alternatives to violating the law.” *United States v. Schoon*, 971
7 F.2d 193, 195 (9th Cir. 1985). The necessity defense does not arise from a “choice” of several
8 courses of action; it requires a real emergency. *Dorrell*, 758 F.2d at 431. Thus if “there was a
9 reasonable, legal alternative to violating the law, the defense fails.” *Id.* Further as the Court in
10 *Schoon* observed the “exercise of a moral judgment based upon individual standards does not
11 carry with it legal justification or immunity from punishment for breach of the law.” *Id.* at 197.

12 Defendants’ claim they have met their threshold burden fails. They claim it was
13 necessary for them to commit the acts for which they are charged because immigrants fleeing
14 persecution are being unnecessarily detained in dehumanizing and abusive detention centers.
15 Defendants contend they therefore sought to meet with Senator Cantwell to make her agree to
16 their demands regarding immigration and detention. The Senator did not respond to Defendants’
17 demands. However, necessity is not a defense to taking actions against a politician who is
18 unresponsive or who disagrees with a constituent’s demands.

19 When Defendants could not meet or speak with Senator Cantwell at her office in the
20 Federal Jackson Building on August 6, 2019, they decided to sit in her lobby even though federal
21 law enforcement instructed them to leave because the federal building was closed.

22 Defendants argue their refusal to leave is an evil that is lesser than the evil of the United
23 States’ immigration detention system and that the detention system far surpasses any evil caused

1 by Defendants' presence in Senator Cantwell's office after closing hours or failure to respond to
2 the lawful directives of federal law enforcement officers at the Jackson Federal Building. Dkt. 44
3 at 5. The argument is nonsensical. Necessity is applicable, for example, where one breaks the
4 speed limit and drives 100 miles per hour to the emergency room in order to prevent a passenger
5 who is bleeding profusely from dying. In this situation the decision to break the speed limit is an
6 evil that is lesser than the decision to allow the passenger to bleed to death. In contrast,
7 Defendants admit they refused law enforcement orders to leave a closed federal building. But
8 their refusal did not and would not avert the harm of which Defendants complain.

9 Defendants argue they reasonably anticipated a direct causal relationship between their
10 conduct and the harm to be averted because other elected officials have "taken steps to avert
11 harm to immigrants." Dkt. 44 at 6. This argument is also nonsensical. If the actions of other
12 elected officials established a direct causal relationship between Defendants' conduct and the
13 harm to be averted, the harm Defendants complain of would have already been resolved. The
14 argument only established that the actions other elected officials have taken have not averted the
15 harm of which Defendants complain. Additionally, Senator Cantwell did not respond to
16 Defendants' requests prior to the date Defendants were arrested. There is thus no basis to
17 conclude the actions of other elected officials establishes Senator Cantwell would engage in the
18 actions Defendants demanded.

19 Defendants further argue they had no legal alternatives to disregarding federal law
20 enforcement's lawful directive to leave a closed federal building or be cited. The Court noted
21 earlier, Senator Cantwell's office offered to have a staff member discuss the matter; offered to
22 have someone from the senator's office call the Defendants, and offered to schedule a meeting.
23 The Defendants refused to accept these alternatives. As the Court in *Dorrell* noted there are

1 many other opportunities to present a message including using the national electoral process,
2 speech on public streets, contacting the press, and now using social media. *Dorrell*, 758 F.2d at
3 432. Defendants declined to utilize these alternatives. Defendants' claim Senator Cantwell's
4 declination to meet with them and effect the changes Defendants asked of her establish they had
5 no alternatives. As discussed above, Defendants had many alternatives, but simply failed to
6 utilize them. Because there is no basis for the necessity defense the government's motion *in*
7 *limine* is granted and the Court precludes the necessity defense.

8 **B. RFRA**

9 The CFR requiring Defendants abide by federal law enforcements' directive to leave a
10 closed Federal Building does not impermissible burden Defendants' sincerely held religious
11 beliefs under RFRA. The government has a compelling interest in being able to enforce the
12 closing hours of a federal building and having members of the public abide by law enforcement
13 requests to leave a closed federal building. Defendants were given a chance to leave and avoid
14 citation but declined to do so. Defendants argue the RFRA nonetheless shields them from
15 prosecution because "requiring the defendants to leave Senator Cantwell's office before she
16 accede to any of the defendants' requests substantially curtailed their ability to achieve their
17 goals." Dkt. 44 at 11. Defendants aren't entitled to force the Senator to do what they want; their
18 attempt to force the Senator to accede to their requests is thus not shielded by the RFRA.

19 Further, Defendants' refusal to follow law enforcement requests to leave the closed
20 federal building is untethered to their attempt to force Senator Cantwell to accede to their
21 requests. Defendants' action thus are not comparable to the "Warren case" in which the
22 defendant was prosecuted for leaving provisions and water in the desert to prevent immigrants
23 from dying. The Court accordingly grants the government's motion *in limine* regarding this

1 defense.

2 **C. FIRST AMENDMENT AND INTERNATIONAL LAW**

3 Defendants state they “do not raise a separate international law and First Amendment
4 Defense” but go to say they do not interpret the Government’s motion to preclude these defenses.
5 *Id.* at 12. The Court rejects Defendants’ position. The record plainly establishes the government
6 moved *in limine* to exclude defenses based upon international law and the First Amendments. As
7 Defendants aver they will not raise international law or First Amendment defenses the Court
8 grants the government’s motion *in limine* and precludes these defenses.

9 For the reasons above the Court **GRANTS** the government’s motion *in limine*, Dkt. 31, and
10 **ORDERS:** All evidence, comment, and argument regarding defenses of necessity, the First
11 Amendment, the RFRA and international law is precluded. Defendants are barred from calling as
12 witnesses Carly Pena, Che Warren, Kelli Truhn, Thomas Bauer, Professor Angelina Snodgrass
13 Godoy, Scott Allen, M.D. and Alice Woldt. Defendants are barred from presenting exhibits
14 regarding the defenses covered in this order.

15 DATED this 29th day of January, 2020.

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18 BRIAN A. TSUCHIDA
19 Chief United States Magistrate Judge
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